

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ATAIN SPECIALTY INSURANCE  
COMPANY,

Plaintiff,

v.

DANIEL SOTO, et al.,

Defendants.

Case No. [17-cv-00573-MMC](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT;  
GRANTING IN PART AND DENYING IN  
PART DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT; VACATING  
HEARING DATE**

Re: Dkt. Nos. 38, 40

Before the Court are plaintiff Atain Specialty Insurance Company's ("Atain") and defendant Daniel Soto's ("Soto") cross-motions for summary judgment, filed January 19, 2018, and February 2, 2018, respectively.<sup>1</sup> The matters have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matters appropriate for determination on the parties' respective written submissions, hereby VACATES the hearing scheduled for March 2, 2018, and rules as follows.

1. The parties agree that an insurance company's duty to defend arises when "facts available to [the insurance company] at the time of tender of defense," see CAN Casualty of California v. Seaboard Surety Co., 176 Cal. App. 3d 598, 605 (Cal. Ct. App.

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<sup>1</sup> The two other defendants named in the instant action, JTS Tree Service, Inc. and Jose M. Soto, have not, to date, appeared, and are in default. (See Doc. No. 26.)

1 1986), reveal “the possibility of covered claims,” see Scottsdale Ins. Co. v. Transp., 36  
2 Cal. 4th 643, 57 (Cal. 2005). Here, contrary to Atain’s contention, for which it provides no  
3 authority, the operative date of tender is August 17, 2016, the date on which Atain  
4 received from Soto a copy of the underlying complaint and request for a defense, not  
5 August 30, 2016, the date on which Atain obtained records from which, Atain argues, it  
6 first learned there was no possible coverage under the policy at issue. See Atlantic  
7 Mutual Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1038 (Cal. Ct. App. 2002)  
8 (finding delivery of complaint to insurance company, which complaint, on its face,  
9 revealed “the possibility of coverage[,] . . . sufficient, at that moment, to create . . . duty to  
10 defend”) (emphasis omitted); see also Montrose Chemical Corp. v. Superior Court, 6 Cal.  
11 4th 287, 295 (Cal. 1993) (noting “[i]mposition of an immediate duty to defend is  
12 necessary to afford the insured . . . the full protection of a defense”).

13 Accordingly, as of August 17, 2016, Atain had a duty to defend Soto in the  
14 underlying action.

15 2. There is no dispute that the underlying complaint is based on statements  
16 concerning the identity of the employer of Jairo Ramos (“Ramos”), which statements  
17 were first published prior to the effective date of the subject policy, specifically, in the  
18 course of the California Department of Industrial Relations’ (“DIR”) investigation into the  
19 circumstances surrounding Ramos’ injury, which investigation closed on January 10,  
20 2015, seven months before the beginning of the policy period. (See Compl. Ex. A at 1  
21 (defining policy period as “From: 08/13/2015 To: 08/13/2016”)). Contrary to Soto’s  
22 contention, the underlying complaint cannot reasonably be read to be based on any  
23 additional statements other than related statements, if any, made at the same time as the  
24 statements made to the DIR. The Court previously considered this issue (see Order, filed  
25 May 16, 2017), and, having reviewed the underlying complaint in the context of the  
26 instant motions, finds no reason to depart from its previous determination.


27 Accordingly, given the policy’s “First Publication Exclusion” (see Compl. Ex. A at  
28 53), Atain has shown there is no possibility of coverage.

Accordingly, Atain is not entitled to reimbursement of the cost of its defense of Soto in the underlying action.

For the reasons stated above, the parties' respective motions are hereby GRANTED in part and DENIED in part as follows:

2. As to the Second Cause of Action, by which Atain seeks a monetary judgment against Soto for the cost of defense, Atain's motion is hereby DENIED and Soto's motion is hereby GRANTED.

**IT IS SO ORDERED.**

  
MAXINE M. CHESNEY  
United States District Judge